



International Center for Policy and Conflict

To:

The Commission on Administrative Justice
The Prime Minister Office Building,
Harambee Avenue,
P. O. Box 20414-00200
Nairobi, Kenya.

From: International Center for Policy and Conflict

Date: Friday, 22nd June 2012

RE: FORMAL PETITION ON THE UNCONSTITUTIONAL BUDGET MAKING PROCESS BY THE MINISTER FOR FINANCE AND THE NATIONAL ASSEMBLY.

International Centre for Policy and Conflict is registered in Kenya under the Trustee (perpetual succession) acts as a global independent non-governmental, non-profit Human Right research and public policy institute.

The International Center for Policy and Conflict would like to express its disapproval in the unconstitutional actions of the Minister for Finance and the National Assembly in the Budget making process for the Financial Year 2012/ 2013.

This Protest Letter/Petition is anchored on Article 37 of the Constitution and the actual grievance stems from Article 221(1) of the Constitution which spells out clearly that the Cabinet Secretary, in the present case the Minister for Finance, shall submit to Parliament at least **two months** before the end of each financial year estimates of revenue and expenditure of the National Government for the next financial year.

We respectfully observe that the current Minister for Finance Hon. Njeru Githae was appointed to this office on the 26th March 2012, one month before the constitutional deadline of two months. However no attempt was made by him to observe the clear cut set deadline for compliance with this Article. We further note that no legal explanation has been given for this failure leaving one logical conclusion; that the Minister is following in the unconstitutional

precedent of his predecessor who publicly admitted that he may not have lived to the strict letter of the Constitution with regard to the timelines of the budget making process. This was after a Petition had been filed by the International Center for Policy and Conflict seeking to block the unconstitutional budget making process purported to have been undertaken by the immediate former Minister for Finance Uhuru Kenyatta. ¹

It is indeed appalling to see the Minister undermine and abrogate the Constitution with no remorse whatsoever. The defence that Kenya is still in a transitional phase is just a flimsy excuse that lacks legal basis as The Transitional Clauses and Consequential Provisions clearly stipulates what Articles of the Constitution are suspended and for how long.

We note further that the current attempt by Treasury to withdraw Ksh. 424 Billion from the Consolidated Fund to meet government expenditure pending the passage of the Appropriation Bill 2012 is illegal and unconstitutional. We observe that, Article 222(1) clearly states that if the Appropriation Act for a financial year has not been assented to, or is not likely to be assented to, by the beginning of that financial year, the National Assembly may authorize the withdrawal of money from the consolidated Fund subject to the fulfillment of certain conditions.

In order for the Minister for Finance to have complied with this Article there must be an Appropriation Act or Bill in place. The Minister is on record to have stated that the Appropriations Bill will not be in place before the 30th of June thus undertaking to bring the Vote on Account before the floor of the house. It would be in breach of the Constitution to proceed to withdraw money from the Consolidated Fund without the existence of an Appropriation Act or Bill as was held In **Jane Mati & Davis Adieno Vs the Hon. Attorney General & the Minister for Finance.** ²

The Parliament and Executive have continuously and intentionally disregarded the Constitution and defied the court's rulings. The Honorable Attorney General Prof. Githu Muigai has failed in his fiduciary duty as the Principal Legal Advisor of the government in failing to promote the rule of law and defend the public interest as well as the Constitution.

We reiterate that Parliament and the Executive are bound and obliged under Article 3(1) to respect, uphold and defend the Constitution. The sovereign will of the people as expressed in Article 1 (1) of the Constitution will be shattered and the country's reputation and integrity highly undermined if your office and those other public offices we have copied in this letter do not ensure compliance with the Constitution and permit contempt of the High Court ruling

¹ International Center for Policy and Conflict vs. Uhuru Muigai Kenyatta and 3 others. Petition No. 87 of 2011.

² Constitutional Petition No. 108 of 2011.

which declared **it unconstitutional for the Government to withdraw money from the Consolidated Fund without a Statutory basis.**³

We want to bring to your attention what the Honorable Chief Justice of Kenya and President of the Supreme Court Dr. Willy Mutunga stated once “we must not be blithe and casual in our treatment of constitutional texts, once freely enacted, after years of struggle and sacrifice. For those who may be tempted to bear the illusion that Constitutions are mere pieces of paper, I want to invite you to reflect on this fact: It is not by accident that when state officers take office, whether in the executive, legislature or judiciary, or even in other independent constitutional offices, they are required to take an oath as prescribed in the constitution. If it did escape your attention before, now it must not: whereas those oaths bear different textual forms, there is always a common refrain: ‘to protect, defend and uphold the constitution and other laws’. **The meaning of this ubiquitous line is direct: all state officers are creations of the constitution and the law. Every Kenyan citizen expects the Executive and Parliament to hold the courts in highest esteem and respect and at all times protect, defend and uphold the Constitution. Accordingly, our observation is in the negative on this fact regarding the budget making process as the Executive and National Assembly have acted in contravention of the Constitution two years consecutively.**

It is only appropriate that the two public officers namely Honorable Njeru Githae and Honorable Attorney General Prof. Githu Muigai be **summoned** by the Commission on Administrative Justice and show course why they should continue to hold public office despite having disregarded the Constitution and contempt of court ruling. We demand that your office give clear sanctions for this unconstitutional conduct.

If no tough sanctions are imposed on the two Public Officers there will not be any deterrence to the Executive and the National Assembly from ceasing to undermine the Constitution and the Courts.

Thank You in Advance.

Yours Faithfully,

Ndung’u Wainaina,

Executive Director

³Ibid.

International Center for Policy and Conflict.

Cc:

His Excellency the President of the Republic of Kenya

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The Right Honourable Prime Minister

Office of The Prime Minister

P.O Box 74434-00200

Nairobi.

The Honorable Chief Justice / President

Supreme Court of Kenya

P.O Box 30041 -00100

Nairobi.

The Honorable Speaker National Assembly

Parliament Buildings

P.O Box 41842- 00100,

Nairobi.

The Chairman, Commission on the Implementation of the Constitution

P.O Box 48041-00100

Nairobi.

The Attorney General,

State Law Office Building

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Po Box 40112-00100

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